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No. 90-748

in the Supreme Court of the United States

October Term, 1990

DAVID JACK VOGT, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

B. Improper Application of the Phrase "To Use Or Invest" Found in 18 U.S.C. §1962(a).[1]

In its Brief In Opposition, the Government understandably parrots the conclusion of the Circuit Court that *sales* of certain assets by Petitioner subsequent to January 5, 1982 fit within the statutory requirement of "[uses or investments]" of racketeering proceeds "in acquisition of any interest in, or the establishment or operation of [an] enterprise . . ." so as to make the prosecution of Count I of the Indictment timely. See 18 U.S.C. §1962(a). (Government's Brief, pages 10-11).

That the articulated (and other similar, but unmentioned) sales of assets (A.25) could qualify as sufficient charging period transactions is premised on an unfortunate and erroneous statement of the Circuit Court that "[o]n the government's sound theory of subsection (a)'s intended application, every time tainted funds or assets purchased with tainted funds were run into or out of one of the enterprise corporations by or at [Petitioner's] direction, this constituted a 'use' by him of those funds or their proceeds in the 'operation' of the enterprise in its intended

[1]As to Questions I.A. and II., Petitioner would respectfully rely on those jurisdictional arguments advanced in his original Petition as fully responsive to and dispositive of those arguments advanced in the Brief For The United States In Opposition.

function, which was precisely to serve as a concealing conduit or repository of the funds or assets." (A.25-26) (footnote omitted). That finding, while perhaps a convenient conclusion for the Circuit Court, was not the Government's position at trial.

The Government took the position in the District Court that these post-January 5, 1982 sales of assets were undertaken not to operate the enterprise, but rather to dismantle it. As noted in the Petition (page 5), during closing argument, the Government specifically referred to these very sales of assets relied on by both the Circuit Court (A.25) and the Government in its Brief (pages 10-11) as the "dismantling" of the enterprise.[2]

Nor did Count One of the Indictment ever describe the "operation" of the enterprise "to serve as a concealing conduit or repository of the funds or assets". To the contrary, Count One of the Indictment stated that the purpose of the enterprise was to effectuate *investments* for Petitioner. (A.14). The "conduit or repository" theory is a creation of the Circuit Court, not a theory of the Government at trial. Unfortunately, Petitioner is now burdened with that characterization of the enterprise.

In its Brief (page 4), the Government states that "[t]he Indictment charged specific acts of use and investment of the bribe money and its proceeds for a period extending to February 25, 1983." This statement is somewhat misleading. Count One of the Indictment (of which Petitioner was

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[2]The Government consistently took this view of those sales during all pre-trial proceedings, as well as in related legal matters. (A.60,74, 78-79). Moreover, these sales were not, as suggested by the Government in its Brief, "in *contemplation* of dismantling the enterprise" (page 11). Under the Government's theory of prosecution, these were part of a concerted effort by Petitioner to actually dismantle the enterprise out of fear of an impending indictment in the State of Florida.

con[illegible] did not charge *any* specific acts of use and investment of the bribe money and its proceeds. To the extent that Count Two (conspiracy to violate the racketeering statute) delineated specific acts, Petitioner was acquitted of that count. The allegations of Count One must, of course, stand on their own. *Dunn v. United States*, 284 U.S. 390, 393 (1932).

In sum, on the facts of this case, the Circuit Court is incorrect in its conclusion that ". . . every time tainted funds or assets purchased with tainted funds were run into or out of one of the enterprise corporations . . . this constituted a 'use' by [Petitioner] of those funds . . . in the 'operation' of the enterprise . . ." (A.25-26). The specific sales of assets cited by the Court (and relied on by the Government) and any other sales of assets after January 5, 1982, were not (under the Government's own trial theory) made for the purpose of using or investing racketeering proceeds, but rather to dismantle the enterprise.[3] The inaccurate characterization of the enterprise by the Court is without basis in the evidence and the Government should not now be permitted to rely upon that description when it is, in fact, at odds with its own characterization of the enterprise in the charging document and at trial.

Since the post-January 5, 1982 sales of assets were made in furtherance of the dismantling of the enterprise, they do

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[3]The Circuit Court's reference to "abundant evidence of 'other things' occurring after January 5, 1982, to support a finding of timeliness" (A.24), referred to by the Government (Brief, page 10) is equally unfortunate because while it sounds so definitive, it is in fact inaccurate. While there are numerous transactions in this case, the vast majority occurred prior to 1982. None qualifies as a use or investment of racketeering proceeds in the establishment or operation of the enterprise subsequent to January 5, 1982. Petitioner would respectfully enjoin this Court to peruse the factual portions of all opinions filed in this case (A.1 et.seq, A.39 et.seq.) for transactions which actually qualify as transactions within the charging period.

not qualify as uses or investments of proceeds in the establishment or operation of that enterprise. The phrase "to use or invest" found in 18 U.S.C. §1962(a) is not broad enough to encompass sales made to destroy the enterprise.

Respectfully submitted,

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